

**DEPARTMENT OF THE ARMY
HEADQUARTERS U.S. ARMY CORPS OF ENGINEERS
COMPLETE STATEMENT
OF
COLONEL MICHAEL J. WALSH
EXECUTIVE DIRECTOR, DIRECTORATE OF CIVIL WORKS**

**FOR THE HEARING BEFORE THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES
ON
THE WETLANDS PERMITTING PROCESS: IS IT WORKING FAIRLY**

**ROOM 2167, RAYBURN HOUSE OFFICE BUILDING
10:00 am, 3 October 2001**

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am Michael J. Walsh, Executive Director, Directorate of Civil Works, Headquarters, U.S. Army Corps of Engineers. I am here today in response to your invitation to Mr. Dominic Izzo, Principal Deputy Assistant Secretary of the Army for Civil Works, representing the Army and the Corps of Engineers.

I believe that the Army Corps of Engineers acts fairly and equitably in carrying out its responsibilities under Section 404 of the Clean Water Act. The Corps is responsible for administering the Section 404 permit program, which regulates the deposition of dredged or fill material into waters of the United States. This responsibility requires the Corps to make jurisdictional determinations, evaluate permit applications resulting in the issuance or denial of permits, and enforce the provisions of Section 404.

Other Federal and State agencies have Section 404 responsibilities as well. Because this hearing is focused on enforcement activities related to Section 404, I will focus my remarks on the Corps responsibilities in that area. I will not, however, address the specifics of enforcement actions that are currently in litigation, or that are in preliminary stages that could lead to litigation, so as not to interfere with those cases.

Corps Enforcement

The Corps enforcement regulations were originally developed to enforce Section 10 of the Rivers and Harbors Act of 1899 pertaining to navigable waters. The enforcement practice that grew out of the Section 10 program was adopted by the Corps for the Section 404 program because it is very flexible. The remedies allowed by

the regulation are focused on ways to bring the violation into compliance without reliance on the judicial system. The Corps also has available administrative civil penalties for use when there are violations of Corps Section 404 permits. However, the Corps general policy in enforcement matters is to pursue corrective measures to address environmental impacts in lieu of administrative penalties. An administrative penalty authority does not exist for Section 10 permits. The Environmental Protection Agency (EPA) has authority to issue administrative civil penalties for violations of Section 404 and exercises its own authority to pursue violations of the Clean Water Act. However, referral of cases to the Department of Justice for prosecution is possible when legal action is warranted.

When the Corps becomes aware of any unauthorized activity still in progress, it first seeks voluntary restoration which, if adequately completed, ends the matter. If voluntary restoration can not be achieved, the Corps issues a cease and desist letter and then begins an investigation to collect facts pertaining to alleged violations. If the unauthorized activity has been completed, the Corps will advise the responsible party through a notice of violation and begin the investigation. Following an evaluation of the information collected through the investigation, the Corps will formulate the appropriate administrative course or legal action to be taken.

The Clean Water Act authorizes the Secretary of the Army to refer a case to the Department of Justice seeking criminal or civil enforcement for statutory violations. The Clean Water Act also authorizes the Secretary to assess administrative penalties for permit non-compliance. The responsibility for implementing the enforcement provisions relating to Section 404 is jointly shared by the Army and the EPA. To ensure that the most efficient use is made of available Federal resources, the Army and EPA have put into effect an enforcement memorandum of agreement (MOA) describing each agency's respective enforcement role. Pursuant to this MOA, the Corps assumes responsibility for most Section 404 enforcement actions because the Corps has a somewhat larger field staff. The MOA provides, however, that the EPA is generally responsible for pursuing those unpermitted activities involving repeat violators, flagrant violations, and classes of activities or cases for which EPA requests the lead enforcement role. The Corps may also recommend that EPA consider imposing an administrative penalty for an unauthorized activity. If a legal action is instituted by either agency against the person responsible for an unauthorized activity, an application for an after-the-fact permit will not be accepted until final disposition of all enforcement proceedings, including payment of all fines as well as completion of all work ordered by the court.

In cases that are to be resolved by the Corps, the district engineer's initial evaluation will determine whether any significant adverse impacts have occurred, or are occurring, which would require expeditious corrective measures to protect life, property, or a significant public resource. Once that determination is made, such remedial measures are administratively requested and a decision is made concerning any

necessary legal action. In certain cases, the district engineer, following the issuance of a cease and desist order, may coordinate with state and Federal resource agencies while deciding what course of action is appropriate.

Voluntary compliance with a request for remedial action is another factor considered by the Corps in determining the proper response to a violation. Corps regulations allow restoration or other remedial action that satisfies the district engineer's requirements to resolve the enforcement action without the need to process a permit application. For those cases that do not require legal action, and for which complete restoration is not requested, the Corps may accept applications for after-the-fact permits. A complete public interest review is then conducted and the district engineer makes a decision concerning the issuance of an after-the-fact permit. After-the-fact permits typically include modifications to the work and mitigation measures to protect the aquatic environment.

The Corps district may request legal action through the Department of Justice, when there is non-compliance with a cease and desist letter or the violation involves significant resource losses and/or there is deterrent value to pursuing a fine or court ordered resolution. In situations where such legal action is warranted, the Corps normally seeks civil actions. Once litigation is determined to be appropriate by the Department of Justice, the Corps provides the necessary documentation and expertise for supporting the government's case. Some of the cases that begin litigation may be resolved through a consent decree, negotiated through the Department of Justice and authorized by the court.

About 6,000 alleged violations involving unauthorized activities or non-compliance with Corps permits are processed in Corps district offices each year. Approximately 60% of these activities involve violations of Section 404 only. Of the remainder, approximately 25% involve combined violations of Section 404 and Section 10, and 15% involve violations of Section 10 only. Much has been said and written about a few highly publicized wetland enforcement cases. The reality is that only 1 percent of all enforcement actions result in any kind of civil or criminal penalty. The vast majority of violations are resolved by after-the-fact permits and voluntary actions by landowners. Only in extreme cases does the government pursue litigation and fines. These highly publicized cases have mostly involved individuals who have clearly disregarded Clean Water Act requirements. It is significant that there have been fewer than a dozen enforcement cases that have been so highly publicized, out of the thousands of enforcement actions that have occurred since enactment of Section 404. It also is important to note that hundreds of thousands of citizens have received authorization under Section 404 and complied with their permit conditions.

The Corps strives to reduce violations by effective publicity, a comprehensive general permit program, and an efficient and fair evaluation of individual permit applications. The philosophy underlying the Corps enforcement of its regulatory

responsibilities is to resolve enforcement actions through gaining compliance in the least confrontational and burdensome manner. Effective enforcement is based on consideration of three factors, the legal requirements, the nature of the violation and the nature of the violator. The basic Corps enforcement policy is to gain compliance with the least amount of conflict and seek stronger enforcement when a violation is severe or the violation is willful, flagrant or knowing.

Mr. Chairman that concludes my statement and I would be pleased to address any questions that you or the committee may have.